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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT TACOMA

10 TIMOTHY R. FOLTZ,

11 Plaintiff,

12 v.

13 MICHAEL J. ASTRUE,  
Commissioner of Social Security,

14 Defendant.  
15

CASE NO. C08-5285BHS

REPORT AND  
RECOMMENDATION

Noted for January 16, 2009

16 This matter has been referred to Magistrate Judge J. Kelley Arnold pursuant to 28 U.S.C. §  
17 636(b)(1)(B) and Local Magistrates Rule MJR 4(a)(4) and as authorized by Mathews, secretary of H.E.W.  
18 v. Weber, 423 U.S. 261 (1976). This matter has been fully briefed.

19 Significantly, the parties agree Plaintiff's medical evidence was reviewed erroneously at the  
20 administrative level. Defendant argues the ALJ made certain errors, requiring remand to the  
21 administration for further consideration. In contrast, Plaintiff argues the errors made by the ALJ make it  
22 necessary to reverse the administrative decision and remand only for an award of appropriate benefits.  
23 Plaintiff also argues, if the matter is remanded for further consideration, that a different ALJ should be  
24 assigned to the matter. After reviewing the record, the undersigned recommends that the Court remand  
25 the matter for further proceedings.

26 FACTUAL AND PROCEDURAL HISTORY

27 Plaintiff, Timothy Foltz, was born in 1967. Mr. Foltz has worked as a rigger, painter, maintenance  
28 assistant, stockroom clerk, carpenter, and engineering assistant. He has not worked since 2002 or 2003.

1 His last job was loading food on Navy ships for Pride Industries. (Tr. 662). He worked there only three  
2 months. While on that job, he hurt his back twice: Once on his landlord's property, once on the job.

3 Mr. Foltz testified that he can't work primarily due to mental limitations. He stated, "I can't  
4 handle the fact that when I was younger at keg parties, I was hypnotized and raped a couple of times, and  
5 I cannot handle it physically." (Tr. 665). He began using drugs around age 17 or 19. (Tr. 665). He  
6 thought he was psychic with ESP and telepathy in his brain and he could hear it over the radio and TV,  
7 and he has been called names like Prophet Timothy. (Tr. 666). He does not think this was caused by drug  
8 use. (*Id.*) He used drugs intermittently in the past. (*Id.*) Mr. Foltz testified that the last time he used street  
9 drugs was in December 2006, right before he was hospitalized for pneumonia. (Tr. 667). Dr. Ritland has  
10 regularly administered drug tests on him since September 2004. (Tr. 667-68). He recalled failing these  
11 tests only twice; once for marijuana, once for cocaine. (Tr. 668). Mr. Foltz testified that he also took  
12 methamphetamine once, when he was hospitalized, and he mistakenly told a doctor he had used  
13 methadone when he meant methamphetamine.

14 Plaintiff filed an application for Social Security Disability benefits on November 6, 2003, alleging  
15 disability since January 25, 2003, due to sciatica, arthritis, knee impairment, hypertension, insomnia,  
16 widespread pain, and mental impairment. (Tr. 74, 79, 99, 118). His application was denied initially and  
17 on reconsideration. (Tr. 57-61, 64-67). Mr. Foltz filed a hearing request, and a hearing was held before  
18 an Administrative Law Judge ("ALJ") on June 22, 2007. (Tr. 655-701). On November 9, 2007, the ALJ  
19 issued a decision in which she found that Mr. Foltz was not disabled. (Tr. 15-30). Mr. Foltz requested  
20 review by the Appeals Council which, on February 8, 2008, denied his request for review, leaving the  
21 decision of the ALJ as the final decision of the Commissioner. (Tr. 5-9).

22 Plaintiff filed the instant complaint for judicial review on or about May 2, 2008, and in his  
23 opening brief, plaintiff argued the ALJ's decision was not properly supported by substantial evidence and  
24 not free of any legal error. Plaintiff raised several issues regarding the validity of the ALJ's decision. In  
25 response to plaintiff's opening brief and arguments made therein, defendant conceded the ALJ erred in  
26 making her decision. Defendant specifically concedes the ALJ erred in evaluating the medical evidence,  
27 including opinions from Kristine S. Harrison, Psy.D., Sandra Ritland, M.D., and Larry Hull, M.D. (Tr.  
28 21-23, 27, 460, 464, 553). Defendant understands this error affected the remainder of the ALJ's analysis,

1 including the other issues Plaintiff raises. As noted above, the only issue before the court is the form of  
2 the remedy or remand to the administration.

### 3 DISCUSSION

4 Remand is appropriate where additional administrative proceedings could remedy defects. Id.;  
5 Bilby v. Schweiker, 762 F.2d 716, 719 (9th Cir. 1985) (*citing* Kail v. Heckler, 722 F.2d 1496, 1497 (9th  
6 Cir. 1984)). An award of benefits is appropriate when no useful purpose would be served by further  
7 administrative proceedings, or when the record has been fully developed and there is not sufficient  
8 evidence to support the ALJ's conclusion. Rodriguez v. Bowen, 876 F.2d 759, 763 (9th Cir. 1989).  
9 Remand is appropriate where additional administrative proceedings could remedy defects. Id.; Bilby v.  
10 Schweiker, 762 F.2d 716, 719 (9th Cir. 1985) (*citing* Kail v. Heckler, 722 F.2d 1496, 1497 (9th Cir.  
11 1984)). Where remand would only delay the receipt of benefits, judgment for the claimant is appropriate.  
12 Rodriguez, 876 F.2d at 763.

13 After reviewing the arguments presented, the court finds the matter should be remanded for  
14 further proceedings. There are several unresolved issues for the administration to consider. For  
15 instance, remand for further proceedings would clarify Plaintiff's severe impairments and functional  
16 limitations, whether he could perform other work, and the materiality of his substance abuse if not.  
17 Plaintiff argues for reversal and an award of benefits based on the argument that the court should credit  
18 the medical evidence supporting disability as true. Evidence should be credited and an immediate award  
19 of benefits directed only when there are no outstanding issues that must be resolved before a  
20 determination of disability can be made, and it is clear from the record that the ALJ would be required to  
21 find the claimant disabled were such evidence credited. Smolen v. Chater, 80 F.3d 1273, 1292 (9th  
22 Cir.1996). Here, it is unclear whether or not Plaintiff is disabled. For instance, medical evidence within  
23 the record contradicts Plaintiff's disability claim, and several doctors concluded that he could work. (Tr.  
24 132, 155-57, 197, 394, 549). The administrative must be given the opportunity to correct its errors and  
25 weigh the evidence appropriately to determine if Mr. Foltz is disabled and entitled to benefits.

26 Finally, the court must address Plaintiff's request that the court direct the matter to a different ALJ  
27 on remand. The selection of a new ALJ on remand has been considered to be within the discretion of the  
28 Commissioner of the Social Security Administration. Hartnett v. Apfel, 21 F.Supp.2d 217, 222

1 (E.D.N.Y.1998) (*citing* Travis v. Sullivan, 985 F.2d 919, 924 (7th Cir.1993)) ( “As a general matter,  
2 courts have held that whether a case is remanded to a different ALJ is a decision for the Commissioner to  
3 make.” ). There have been several instances, however, in which courts (including this court) have  
4 ordered or recommend that the Commissioner assign a case to a different ALJ on remand. In Kolodnay v.  
5 Schweiker, 680 F.2d 878, 879-80 (2d Cir.1982), the court remanded to a new ALJ because the original  
6 ALJ had failed to adequately consider the medical evidence. *See also*, Miles v. Chater, 84 F.3d 1397,  
7 1401 (11th Cir.1996) (remanding to a new ALJ because of the original ALJ's failure to support his  
8 findings with evidence reflected that “the process was compromised.” ); Ventura v. Shalala, 55 F.3d 900,  
9 904 (3d Cir.1995) (remanding to a new ALJ because of original ALJ's offensive conduct).

10 Remand to a different ALJ is based on the premise that impartiality of the ALJ is “integral to the  
11 integrity of the [disability review process]. ” Miles, 84 F.3d at 1401 (internal citations omitted). The ALJ  
12 has a special duty to fully and fairly develop the record and to assure that the claimant’s interests are  
13 considered. Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983). Remand to a new ALJ is necessary in  
14 those situations which compromise that integrity. Specifically, when the conduct of an ALJ gives rise to  
15 serious concerns about the fundamental fairness of the disability review process, remand to a new ALJ is  
16 appropriate. Factors for consideration in this determination include: (1) a clear indication that the ALJ  
17 will not apply the appropriate legal standard on remand; (2) a clearly manifested bias or inappropriate  
18 hostility toward any party; (3) a clearly apparent refusal to consider portions of the testimony or evidence  
19 favorable to a party, due to apparent hostility to that party; (4) a refusal to weigh or consider evidence  
20 with impartiality, due to apparent hostility to any party. Sutherland v. Barnhart, 322 F.Supp.2d 282,  
21 (E.D. NY 2004); *see also* 20 C.F.R. § 404.940.,

22 Here, Plaintiff does not point to any conduct of the ALJ, other than her adverse decision, to  
23 warrant remand to a new ALJ. The ALJ did not demonstrate any bias or prejudice in her decision. The  
24 decision is simply based on an error of consideration of the medical evidence and the analysis that flowed  
25 from that consideration. Therefore, it is inappropriate for the court to remand the matter a different ALJ,  
26 although the administration retains full discretion to do so if it so chooses.

#### 27 CONCLUSION

28 Based on the foregoing, the undersigned recommends that the Court REMAND the matter to the

1 administration with the direction that the Commissioner assign a new ALJ.

2 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil Procedure, the  
3 parties shall have ten (10) days from service of this Report to file written objections. *See also*  
4 Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those objections for purposes of  
5 appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the  
6 clerk is directed to set the matter for consideration on **January 16, 2009**, as noted in the caption.

7 DATED this 24th day of December, 2008.

8  
9 /s/ J. Kelley Arnold  
J. Kelley Arnold  
10 U.S. Magistrate Judge  
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